No. 87-1661

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In The

Supreme Court of the United States

October Term, 1988

ASARCO INCORPORATED, ET AL.,

Petitioners,

v.

FRANK AND LORAIN KADISH, ET AL.,

Respondents.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF OF THE STATES OF CALIFORNIA, IDAHO, MONTANA, MINNESOTA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did Congress, in extending the school lands grant to mineral-bearing lands, intend to give state legislatures unlimited authority to abrogate the trust in which such lands are held?

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INTEREST OF AMICI STATES

The amici states represented in this brief have a vital common interest in the assertion and protection of their school lands trust responsibilities and in preventing extraneous pressures from interfering with the prudent management of school lands trust assets. School land revenues represent an important asset for the public schools of the states with school lands. A recent study shows that 10 western school land states received a total of $357 million in trust revenues from those lands in fiscal year 1987. S. Fairfax and J. Souder, Western States' Trust and Sovereign Land Resource & Management Survey Questionnaire 43 (Inst. of Govt'l. Studies Univ. of Calif., Berkeley July, 1988).

Petitioners assert that the trust responsibilities placed upon the several western states through their enabling acts were repealed by the Jones Act grant of mineral lands to the states. Pet. Br. at 32-34. Not only does the legislative history of the Jones Act belie this claim, but the states' interpretation of the trust responsibilities imposed upon them by their enabling acts and extended to mineral lands by the Jones Act confirms the essential inaccuracy of ASARCO's assertions. No state other than Arizona treats its mineral-bearing trust lands as if trust responsibilities did not attach and as if the fair market value of the assets were irrelevant. At a minimum, all other states receiving school trust lands of mineral character under the Jones Act require negotiation of royalty amounts or set *minimum* royalty values. No state legislature other than Arizona's has interpreted its trust responsibility to allow trust assets to be leased or sold at a *maximum* royalty value or even given away at no receipt of value by the state at all.

The amici states herein respectfully request this Court to uphold the decision of the Arizona Supreme Court enforcing Arizona's obligation to manage its school lands trust assets for the maximum benefit of the public schools.

STATEMENT OF THE CASE

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

The school lands grant to newly admitted states represents a solemn agreement between the federal government and the states under which, in exchange for a representative portion of the public lands, the states would forbear attempting to tax or gain possession of the large federal holdings within their borders, and would commit their revenues for the support of the public schools. This statutory grant has its roots in the earliest years of the New World. As it developed in the public land states, it represented a painfully wrought compromise designed to avoid serious constitutional questions of equal footing raised by the discrepancy of federal landholding between the original 13 states and those that later joined the Union.

When Congress extended this grant to mineral lands in 1927 it did not intend that these more valuable trust assets should enjoy lesser protection than those already granted to states since 1802. In authorizing their lease in

such manner as the state legislatures may prescribe, Congress intended that states should have flexibility in their administration; not the power to give them away at fire sale prices.

ARGUMENT

I.

INTRODUCTION

The concept of granting lands for the support of schools pervades American history. As early as 1635 the Massachusetts General Court made an island in Boston Harbor available to the town of Dorchester for its public schools, and 1,000 acre tracts were set aside by Boston and other towns for support of the public schools throughout the 17th century. B. Hibbard, A History of the Public Land Policies 306 (Macmillan 1924). Similar grants were recorded in Maryland, Virginia and New Netherlands. *Id.* 307-308. The policy of setting aside lands for education was embraced by the Continental Congress in the Ordinance of May 20, 1785, which reserved the 16th section of every township of the Western Territory for the maintenance of public schools. The Northwest Ordinance set forth its policy succinctly: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of July 13, 1787, set forth in Donaldson, The Public Domain 224 (GPO 1884); see *United States v. Wyoming*, 331 U.S. 440, 443 (1947).

Its roots are deep in federalism. Although later expressions have described the grant as a simple bargain in which the federal government agreed to give lands in exchange for the states' commitment to support their public schools with the revenues, it appears to have a basis as well in the historic tug of war over federal landholding. Several commentators have characterized it as part of the compromise under which the public land states agreed not to contest or tax the federal landholdings within their borders in exchange for the school land and other grants. Gates, History of Public Land Law Development 317 (Zenger Ed. 1968); S. Fairfax and C. Yale, Federal Lands 16 (Island Press 1987). The grant of numbered sections within each township was designed to provide the states with "a proportionate part and fair cross section of all classes of land within its boundaries." Remarks of Senator Watkins, 104 Cong. Rec. 11919-11922 (1958). See *Andrus v. Utah*, 446 U.S. 500, 508 (1980). In the history of the program, over 77 million acres were given for the common schools. As one commentator said, "The galvanizing effect of the grants in stimulating education can hardly be exaggerated." Gates, *supra*, 319-339. In "The Winning of the West," Theodore Roosevelt said the school grants laid "the basis for the whole system of public education" in the western states.

Revenues from the school lands provided the principal base for public education throughout the west. They were valuable because full value was derived from them. It is questionable whether, in the "gilded age" of the

nineteenth century, this would have occurred in the absence of trust obligations.[1]

The contribution of the school grants to the developing states is all the more astonishing in light of the general state of public land administration in the nineteenth century. Fraud, incompetence and inefficiency were rampant in the disposition of the public lands. A contemporary description of the state of affairs indicated "The great corporations and other monopolies have for many years been stretching out their strong and unscrupulous arms over the public lands . . . Millions of acres of this domain have been seized and stolen, and I have to say this robbery could not have succeeded without the collusion and cooperation of agents employed to protect the interests of the people." Comments of Judge David Davis, quoted in H. Dunham, Some Crucial Years of the General Land Office, 1875-1890, reprinted in The Public Lands, Carstensen ed. (U. of Wis. Press 1968). See also Nash, The California State Land Office, 1858-1898, 27 Huntington Lib. Q. 347 (1963-64).

Adherence to strict trust principles remains essential to carrying out the high purposes of the grant. For that reason statutes that violate the states' trust responsibilities by setting arbitrary values on school lands or their products are invalid.

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[1] Indeed the progressively more specific restrictions on the states' administration of school lands indicates increasing realization of the value of the trust obligation. See *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947).

Petitioners have properly noted that the question before this Court is one of substantial importance to other western states as well as to Arizona. However, the states represented herein differ with petitioners as to the reason for its importance. We suggest that the Arizona Supreme Court's decision below does not affect the states' "sovereign choice of how to manage their resources and support its schools." Petn. for Certiorari p. 8. Rather, the opinion supports the time-honored proposition that the school land grant imposes a trust obligation upon states to administer trust assets in a prudent and proper manner.

II.

THE SCHOOL LAND GRANTS CONFER DISCRETION ON STATE LEGISLATURES TO ADMINISTER THE TRUST. THIS DISCRETION DOES NOT EXTEND, HOWEVER, TO GIVING ITS ASSETS AWAY AT FIRE SALE PRICES

The school land grant has often been characterized as a contract; a "solemn agreement," under which the Congress agreed to cede lands to the States in exchange for their commitment to use the revenues for public education. *Andrus v. Utah, supra,* 446 U.S. at 507; *Oklahoma Education Assn. Inc. v. Nigh,* 642 P.2d 230, 235 (Okla. 1982); *State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist.,* 8 N.W.2d 841, 847 (Neb. 1943).

The school land grants have varied in their provisions. Some are general, merely granting the lands "for school purposes." Other grants make specific provision for their use and disposal and contain provisions for enforcement of their terms. Generally the grant is made in the enabling act under which the state enters the

union, and the state constitution subsequently adopted accepts the grant with accompanying restrictions on the use of the lands, their proceeds or both. See *Hibbard, supra,* 314-318. Even in the case of the most general statutes, however, the grant has been construed as imposing an honorary trust obligation to obtain value for school lands leased or sold. Cf. *Alabama v. Schmidt,* 232 U.S. 168 (1914); *United States v. 111.2 Acres of Land,* 293 F. Supp. 1042 (E.D.Wn. 1968), affd. 435 F.2d 561 (9th Cir. 1970). As this Court observed in considering the school grant to the State of Michigan:

> "In the present instance, the grant is to the State directly, without limitation of its power, although there is a sacred obligation imposed on its public faith." *Cooper v. Roberts,* 18 How. (59 U.S.) 173, 181-182 (1855). See also *Alabama v. Schmidt,* 232 U.S. 168 (1914).

The trust in which these lands are held subjects the states to the same fiduciary obligations as apply to a private trustee. *County of Skamania v. State,* 685 P.2d 576 (Wash. 1984). The grant is intended to curb the power of the state to deal with the trust lands in the "prophetic realization . . . that the state might [otherwise be] lured from patient methods to speculative advertising . . . in the hope of a speedy prosperity." *Ervien v. United States,* 251 U.S. 41, 47-48 (1919).

While considerable latitude is given with respect to the manner in which the legislature may carry out its duty to administer school lands for the benefit of the public schools, *Ashburner v. California,* 103 U.S. 575 (1880); *Pike v. State Board of Land Commissioners,* 113 P. 447 (Idaho 1911), the states nevertheless must obtain current fair

market rental value for these lands. *State ex rel. Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951). See 73 Corpus Juris Secundum, Public Lands, sec. 97, p. 735: "The state holds title to school lands in trust . . . So, it is without power, as trustee, through legislative means or otherwise, to bestow a special benefit on any person or corporation, public or private, at the expense of the cestui que trust, the public school system of the state, or to alienate the school lands without receiving their full value." Thus even under a grant which appears to be absolute in its terms, the state has been held to have a trust obligation to receive fair value. E.g., 41 Ops.Cal.Atty.Gen. 202 (1963), construing Act of March 3, 1853, 10 Stat. 244.

In case after case, courts have held that the power of legislatures to provide for the manner in which the trust is administered does not carry with it the authority to subvert it for the benefit of other otherwise worthwhile purposes. *Oklahoma Education Assn., Inc. v. Nigh, supra*, 642 P.2d at 236 (authority to set rules and regulations limited to those achieving protection of assets coupled with maximum return); *State ex rel. Ebke v. Bd. of Ed. Lands & Funds*, 47 N.W.2d 520, 525 (Neb. 1951): "That the Legislature has the power to provide the method of administering the public school lands of the states as a trust is not subject to question. But the method provided must be one which is within the law governing administration of trust estates."

III.

HOLDINGS ARE UNIFORM TO THE EFFECT THAT THE UNDIVIDED DUTY OF LOYALTY TO THE TRUST PRECLUDES ITS ADMINISTRATION FOR OTHERS THAN ITS BENEFICIARIES

The temptation to use trust assets to benefit other worthy purposes has given rise to substantial litigation in this field. But uniformly, courts have held that the undivided duty states have to administer this trust for the schools precludes them from diverting its assets. Thus the states may not use their school trust assets to subsidize their highway programs, *Lassen v. Arizona*, 385 U.S. 458 (1967). They may not use them to benefit farming and ranching, *Oklahoma Ed. Assn Inc. v. Nigh, supra*, 642 P.2d 230. They may not modify contracts made for its benefit even to protect an endangered logging industry. *County of Skamania v. State, supra*, 685 P.2d 576.

Previous state court decisions have dealt with the language which petitioners contend absolves legislatures of their trust responsibilities. In every case, the courts reached the opposite conclusion. And properly so, for, as the Solicitor General has observed in this case, "(I)t would be inappropriate to limit the reach of that (appraisal) requirement, which was at the heart of the Enabling Act, without a clear indication that congress so intended." Brief for the United States as Amicus Curiae 13.

In *Oklahoma Education Association v. Nigh, supra*, 642 P.2d 230, the court considered Oklahoma's enabling act provision permitting leasing of trust lands "under such rules and regulations as the Legislature . . . may prescribe." It held that the legislature nonetheless was

bound by trust responsibilities to achieve maximum return of assets. Much the same construction was given this language by the Arizona court in 1970. In *State Land Department v. Tucson Rock & Sand Co.*, 469 P.2d 85 (Ariz. 1970), reviewed on other grounds, 481 P.2d 867 (1971), the court held that the phrase "such manner as the legislature may direct" merely authorizes the legislature to regulate the manner in which a lease is made and to set terms not in conflict with the enabling act.

It is noteworthy that the Land Commissioner of New Mexico, which was admitted under the same enabling Act (New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910)), filed an amicus brief before the Arizona Supreme Court showing that New Mexico remains subject to the same fiduciary duty to maximize revenues as that set forth in the Arizona Court's opinion. In it he states: "The sale and leasing procedures specified by the New Mexico-Arizona Enabling Act evince the intent of Congress that neither the federally granted lands nor their products should be sold or leased by the states for less than the best possible price." Amicus Curiae Brief Of the New Mexico Commissioner of Public Lands at 13.

IV.

ESTABLISHED TRUST PRINCIPLES PRECLUDE LEGISLATURES FROM SETTING ARBITRARILY LOW LEASE VALUES FOR SCHOOL LAND LEASES

The principles of trust apply to the school land grants. *County of Skamania v. State, supra,* 685 P.2d 576; *Oklahoma Ed. Assn. v. Nigh, supra,* 642 P.2d 230; *State ex rel. Ebke v. Bd. of Educ. Lands & Funds,* 47 N.W.2d 520 (Neb.

1951); *State v. University of Alaska,* 624 P.2d 807 (Ak. 1951). A review of appropriate trust principles highlights the duties of legislatures in this respect.

In any sale of trust assets, the principal objective is to obtain the maximum price. Bogart, The Law of Trusts and Trustees, sec. 745, p. 6 (2d rev. ed. 1980). The trustee must determine the fair value of trust property before selling it. *Whatley v. Wood,* 404 P.2d 537 (Colo. 1965). He must secure the highest possible prices and the best possible terms. *Allard v. Pacific National Bank,* 663 P.2d 104 (Wash. 1983). And he has, in the field of school lands, a duty of undivided loyalty (subject, of course, to environmental and other statutes of general applicability) that prevents even injection of the interests of third parties such as the general public in the management of the school land res. *Ervien v. United States, supra,* 251 U.S. 41; *County of Skamania v. States, supra,* 685 P.2d 576; *State ex rel. Shepard v. Mechem,* 250 P.2d 897 (N.M. 1952); *Lake Arthur Drainage Dist. v. Field,* 199 P. 112 (N.M. 1921). A statutorily mandated maximum price for leases inevitably inhibits obtaining maximum revenues. Just as the Washington legislature was precluded from modifying timber sales contracts in an effort to protect a threatened industry, the legislature here was precluded from setting maximum royalty rates that might encourage industry development at the expense of school revenues.

V.

CONSTRUCTION OF THE SCHOOL LAND GRANT URGED BY PETITIONERS IS ABERRANT TO THE DOCTRINE AS IT HAS EVOLVED IN THE WESTERN STATES

Of the thirteen states affected by the Jones Act, seven had enabling acts requiring the disposition of school

lands at public sale.[2] Each of these states has interpreted their enabling acts and the Jones Act to extend the state's trust responsibilities to the disposition of school trust-lands of mineral character.[3]

For instance, the Colorado Act merely grants sections 16 and 36 of every township to the State "for the support of the common schools," 13 Stat. 32, ch. 37, sec. 7 (1864). Yet, the State of Colorado has applied its trust responsibilities to protect the disposition of the mineral assets granted it by the Jones Act. The Board of Land Commissioners of the State of Colorado is charged with the duty to secure "the maximum possible amount therefor . . . under such regulations as may be prescribed by law" for its school trust lands of mineral character, and it does so by calculating royalties as a percentage of gross mineral value and negotiating such royalties on a case-by-case basis within a range of 4 to 7 percent. Colo. Const. Art. IX sec. 10; C.R.S. sec. 36-1-113.

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[2] The states principally affected by the Jones Act are Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. See S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

[3] The constitutions of a number of states also require the prior appraisal of trust assets generally, with no exemption for minerals. The Idaho Constitution, for example, prohibits the sale of trust lands at less than the "appraised price". Idaho Const. Art. IX, sec. 8. The Montana and Washington Constitutions prohibit the disposal of school trust assets for less than "full market value". Mont. Const. Art. X, sec. 11; Wash. Const. Art. XVI, sec. 1. In Wyoming, school lands can be disposed of only at public auction after appraisal, with the Board of Land commissioners directed "to realize the largest possible proceeds." Wyo. Const. Art. XVIII, secs. 1 & 3.

Colorado's application of its trust responsibilities for school lands of mineral character should be applauded and upheld as the proper interpretation of Congress' intent in extending the school land trust to mineral assets through the Jones Act.

Similarly, the enabling act admitting the states of Montana, South Dakota, North Dakota and Washington to the Union provided that school lands be disposed of only at public sale and that leasing of school lands be conducted "under regulations the legislature shall prescribe." 25 Stat. 679, ch. 180, sec. 11 (1889). Each state has interpreted this provision as subjecting the disposition of mineral lands to the state's trust responsibilities to manage assets for the benefit of the public schools. The Montana Constitution prohibits the disposition of school trust lands without payment of full market value. Mont. Const. Art. X sec. 11. Montana's legislature has delegated discretion to set royalties for leases on Montana's mineral lands on a case-by-case basis but at a *minimum* of 5 percent of smelter returns for metals or of the full market value of the minerals recovered. M.C.A. sec. 77-3-116. See *Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985).

The State of Washington has taken the same position based on the same language that act. 25 Stat. 676, ch. 180 sec. 11 (1889). The Washington Constitution allows disposal of trust assets only for "full market value . . . to be ascertained in the manner as may be provided by law." Wash. Const. Art. XVI, sec. 1. The state legislature has delegated responsibility of setting royalty rates to the Washington Board of Natural Resources. R.C.W. sec. 79.01.644.

Both the North and South Dakota constitutions direct that mineral leasing of school trust lands be carried out in the manner determined by the respective state legislatures. N.D. Const. Art. IX sec. 5; S.D. Const. Art. VIII sec. 19. Both states interpret the fulfillment of their trust responsibilities to require the setting of *minimum* royalty rates for mineral leasing. In North Dakota all mineral leases must be competitively bid and minimum royalty rates and terms are set by the Board of University and School Lands. N.D.C.C. secs. 38-11-04; 38-11-02.1, .2. The South Dakota legislature has set minimum royalties at $25 per year plus 5 percent of the fair market value of the minerals extracted with a delegation of responsibility to set additional royalties to the Commissioner of School and Public Lands. S.D.C.L. sec. 5-7-11.1. The South Dakota Commissioner for School and Public Lands has increased the royalty from the statutory minimum of 5 to 10 percent of fair market value of minerals extracted and may require competitive bidding for such mineral leases. S.D.C.L. secs. 5-7-2, 5-7-11.1; S.D.Admin.R. 4:01:03:04.

All four of these states have interpreted their trust responsibilities to apply to the leasing of mineral interests on lands granted to them by the United States for the support of the public schools. Each of these states has interpreted its trust duties to include setting at least a *minimum* royalty and Montana and Washington explicitly require the maximization of revenues for the support of the public schools.[4]

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[4] It is interesting to note that Minnesota, the nation's leading producer of iron ore, discharges its obligations under

(Continued on following page)

The states of Idaho and Wyoming were also admitted to the Union by enabling acts permitting the disposal of school trust lands only at public sale pursuant to such laws as their respective legislatures shall prescribe. 26 Stat. 215, 216, ch. 656, sec. 5 (1890); 26 Stat. 222, 223, ch. 664, sec. 5 (1890). The Idaho Constitution applies the state's trust responsibilities to school trust lands by requiring the Idaho Board of Land Commissioners to lease trust lands in a manner that will secure maximum long-term financial return and not be sold for less than the appraised price. Id. Const. Art. IX, sec. 8. Current Idaho statutes allow the Board to set royalties on a case-by-case basis with a *minimum* royalty of two and a half per cent. Id. Code sec. 47-704.

(Continued from previous page)

applicable federal-state law relating to school grant land by marketing its school, swamp, and other federal grant land minerals under a public auction leasing system that requires bidders to meet or exceed minimum base royalty rates established by statute or administrative sale (*see* Minn. Stat. secs. 93.08-93.12 and 93.14-93.25, for example). Minnesota does so even though it is not subject to the Jones Act and even though the state possesses greater latitude than possessed by the western states, as described in this brief, in the management of school lands under Minnesota's enabling act 11 Stat. 166, 167, ch. 31, sec. 5 (Act of Feb. 26, 1857) and other applicable federal acts, the Minnesota Constitution, and related decisions of federal and state courts, such as *Essling v. Brubacher*, 55 F.R.D. 360 (1971), *aff'd.*, No. 72-1034 (8th Cir. June 8, 1972), *cert. denied*, 409 U.S. 950 (1972); *State of Minnesota v. Evans*, 99 Minn. 220, 108 N.W. 958 (1906); and *Lawyer v. Great Northern Ry. Co.*, 127 N.W. 431 (Minn. 1910). For these reasons Minnesota concurs with the conclusions of the other amici to the extent that school land grant states do not possess unfettered authority to dispose of mineral bearing school lands.

The Wyoming Constitution directs that state's Board of Land Commissioners to "realize the largest possible proceeds" from the disposition of school trust lands. Wyo. Const. Art. XVIII, secs. 1,3. The applicable statute requires royalties to be set on oil and gas at a minimum rate of five per cent on all oil and gas produced and saved from and not used in operations on leased lands. W.S. 36-6-101(a). The State's rules and regulations set a minimum rate of 16 and two-thirds per cent unless a different rate is set by the Board. Rules and Regulations Governing Leasing of Subsurface Resources (March 1, 1982).

The State of Oregon has also incorporated its trust responsibilities in the language of its Constitution. Although the Oregon Admissions Act merely states that the numbered sections are granted "for the use of the schools," 11 Stat. 383 sec. 4 (1859), the Oregon Constitution requires the State Land Board to manage trust lands "with the object of obtaining the greatest benefit for the people of the State, consistent with the conservation of this resource under sound techniques of land management." Or. Const. Art. VIII sec. 5. The Oregon Legislature has directed the Division of State Lands to negotiate royalties to fulfill those trust purposes. O.R.S. sec. 273.551 (1).

Finally, the State of California, another Jones Act state, leases its oil and gas resources to the highest responsible bidder upon competitive bidding. Calif. Pub. Res. Code sec. 6815.1.

A decision from this Court rejecting as a matter of federal law the Arizona Supreme Court's application of

these widely accepted trust values and responsibilities to Arizona's school trust lands of mineral character would provide grounds for questioning the law of other states that have made full and sincere efforts to uphold their trust responsibilities to seek the long-term maximization of the incomes of state public school and university systems.

CONCLUSION

The issue before this Court is relatively simple: Should the language of the Jones Act authorizing legislatures to determine the manner in which mineral-bearing school lands are leased be construed as to give them unfettered authority to give away trust assets? If petitioners' arguments are adopted, legislatures could just as easily set a one cent royalty as a $5 one. And the entire meaning and purpose of the school lands trust would be abrogated.

However this is not the case. The language of the Jones Act does not represent a turnabout in the consistent purpose of Congress that the beneficiary schools of the public land states receive the "full benefit" of the grant. *Lassen v. Arizona, supra,* 385 U.S. 458, 468. Rather, as the Court of Appeals for the Tenth Circuit characterized it: "(t)he manifest and predominating purpose of Congress was that the lands were to be disposed of in a manner that would bring the greatest returns to the beneficiary of the grant. That, of course, is always the duty of a trustee. The state took the land in trust to that end." *Terry v.*

Midwest Refining Co., 64 F.2d 428, 434 (10th Cir.), cert. den., 290 U.S. 660 (1933).

Respectfully Submitted,

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